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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA JONATHAN LAZOS, Defendant and Appellant.	B204121 (Los Angeles County Super. Ct. No. BA259099)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

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Joshua Jonathan Lazos appeals his conviction for the first degree murder of Daniel Santoyo. He contends: (1) The trial court should have instructed on voluntary manslaughter and on imperfect defense of another person, or, alternatively, he received ineffective assistance of counsel because his counsel did not request instructions on those subjects. (2) The trial court gave inadequate instructions on aiding and abetting.

We find no error and affirm.

PROCEDURAL HISTORY

Appellant and his much-older brother, Frank Daniel Lazos (Frank), were jointly charged with committing numerous crimes on January 13, 2004. Count 1 charged both defendants with the murder of Daniel Santoyo. Counts 2 through 5 alleged that both defendants attempted to murder and committed assaults upon two police officers. Count 6 charged Frank alone with possession of a firearm by a felon. Count 7 alleged that Frank alone murdered Jose Angel Solano. Count 7 included a multiple-murder special-circumstance allegation for Frank. All of the counts had firearms allegations.

The trials of the two defendants were later severed. The record does not show the result of Frank's prosecution. Prior to trial, at the People's request, all charges were dismissed against appellant except count 1 and its accompanying allegation that appellant personally and intentionally discharged a handgun pursuant to Penal Code section 12022.53, subdivision (d) (section 12022.53(d)).

The jury found appellant guilty of first degree murder but found the section 12022.53(d) allegation not true. Appellant was sentenced to 25 years to life in prison. This appeal followed.

FACTS

1. Introduction

Appellant was 14 years old on January 13, 2004, when Santoyo was killed. Appellant lived at that time with his mother and other relatives in an apartment in the Baldwin Hills area. Frank had been living at the apartment for a week, following his release from prison.

Witnesses at the trial described the two perpetrators as the "person in the gray shirt" and the "person in the Pendleton." Appellant never contested that he was the person in the Pendleton and Frank was the person in the gray shirt. The issue was which one shot Santoyo. For clarity, our summary of the evidence usually uses the names "Frank" and "appellant," instead of referring to them by their clothing.

2. The Murder of Jose Angel Solano Earlier That Day

Evidence of Solano's murder was introduced during the defense case to support an inference that Frank was "basically a serial murderer" who shot both Solano and Santoyo.

Solano died about 5:40 p.m. on January 13, 2004, from a single gunshot to the head. The bullet entered at his chin and exited through the back of his head. The presence of stippling suggested that the gun was fired when it was 18 to 24 inches from his face.

The jury heard the prior testimony of G.S. and C.H., who testified about Solano's murder at Frank's preliminary hearing. They indicated that three strangers approached while they were sitting with Solano and other friends in the driveway of a residence in West Los Angeles. G.S. and C.H. identified Frank as one of those three. All they said about the other two was that they were younger male Hispanics, between the ages of 13 and 15 years old. Frank was "pretty much under the influence of alcohol." He said he belonged to a particular street gang. He looked at Solano and asked Solano "where he was from," the common inquiry about gang affiliation. Without waiting for an answer, Frank turned around, grabbed a gun from his companions, pointed the gun at Solano's face, and shot him. Solano fell to the ground and died. The gun Frank used was a silver revolver with a long barrel, the same .44-caliber weapon that was used when Daniel Santoyo was killed later that day.

3. Prosecution Evidence Regarding Santoyo's Murder

Around 9:40 p.m. on January 13, 2004, A.B. and her male friend C.S. were walking in an alley in the Baldwin Hills area, about two blocks away from appellant and Frank's apartment. C.S.'s aunt lived in the apartment building next to the alley. C.S. did not currently belong to a gang, but he previously belonged to the "Black P-Stones."

As A.B. and C.S. approached the gate from the alley to the apartment building, appellant and Frank walked near them in the alley. According to A.B., Frank held the large shiny revolver, and appellant held a black gun. On cross-examination, C.S. said the object in appellant's hand might have been a cell phone or a stick. C.S. testified, more generally, that he simply saw that one of the two people had a gun. A.B. and C.S. ran to the apartment of C.S.'s aunt and went inside. They heard appellant and Frank yelling in the building's courtyard, uttering words like: "Hey, we're not your enemy, we're not 18, we're from M.S. . . . , come out, come out, there [are] no problems." A.B. and C.S. stayed inside.

K.H. and her two young children were home that evening in their upstairs apartment in that building. Under K.H.'s apartment, the carport ran along the back of the building, separated from the alley by a fence. K.H.'s apartment had windows that faced toward the courtyard in front of her apartment, toward the alley behind her apartment, and toward the walkway that ran between the alley and the courtyard. Moving from window to window, K.H. watched what happened next, although the building partly obstructed her view of events in the alley, directly under her window.

K.H. looked out her windows when she heard angry yelling. She saw Frank and appellant walk into the courtyard from the alley. Once they entered the courtyard, she heard them yelling and cursing at an apartment, as if trying to get someone to come out. One of them held the big silver handgun. K.H. was "pretty sure" that Frank, the person in the gray shirt, had the gun at that point in time.

K.H. dialed 911. She told the operator that two people had come through the gate yelling gang slogans, one of them had a large silver pistol, and he appeared to be "going for one of the neighbors." She said that there were young men living in the downstairs apartment, but they were not coming out. She mentioned that the person with the pistol wore the gray shirt and the other one wore the Pendleton shirt. She was worried that her children might be hit by a bullet. The operator promised her that the police would arrive soon and advised her to lock her doors and windows and keep her children inside.

After the 911 call, K.H. saw appellant and Frank leave the courtyard and walk back to the alley. K.H. had her children move from their bedroom, which was above the alley, to the bathroom floor. Looking down directly below her into the alley, she saw appellant, the person in the Pendleton shirt, standing with his arm extended straight out. At the trial and at the preliminary hearing, K.H. testified that she could not see what was in appellant's hands. When she was interviewed by police officers a few hours after the incident, and in two subsequent interviews with Police Detective Whelan, she said she saw appellant holding the same large silver gun that Frank had held in the courtyard. She also told Whelan that while appellant pointed the gun, the person in the gray shirt, Frank, stood at appellant's side and pushed the victim back. She could not actually see the victim. She tried to tell Detective Whelan exactly what she saw and had a better memory when she spoke with him than when she testified at the trial. It was unpleasant for her to recall what she saw and she feared for her own and her children's safety, but no one had threatened her. On cross-examination, she said she saw pushing or shoving, but not wrestling, and "couldn't see what position the hand was in or whether anything was in the hand." On redirect examination, she clarified that she saw appellant's arm extended toward the building's carport, her vision was cut off at his wrist, "[h]e kept like moving back," and she believed the object in his hand "was possibly a weapon."

When she saw what was happening in the alley, K.H. went next door to the apartment of her cousin, L.L. Standing outside L.L.'s door, K.H. said she thought someone was about to be shot. K.H. and L.L. both then heard a loud shot. Later that night, K.H.'s young son told her that, before the gunshot, he heard someone say, "Please don't shoot me, please don't shoot me."

L.L. testified that, from her apartment, she could see into the courtyard but not into the alley. Earlier, before she spoke with K.H. and heard the shot, she looked out her window when she heard the yelling in the courtyard. According to L.L., but not K.H., it was appellant, the person in the Pendleton shirt, and not Frank, the person in the gray shirt, who held the large silver-colored gun in the courtyard. When L.L. saw the gun, she

closed her blinds and got down on the floor. K.H. came to her door within 60 to 90 seconds. She spoke briefly with K.H., and then heard the "boom" from the gun.

Three officers of the Los Angeles Police Department, Mark Hamer, Freddie Piro, and Tiffany Tingrides, were on patrol a few blocks away when they heard the radio dispatch about K.H.'s 911 call. They heard the loud gunshot when they were near the apartment building. Twenty to 25 seconds later, they saw appellant and Frank walking out of the alley together. The officers got out of the patrol car and told appellant and Frank that they wanted to talk with them.

Appellant and Frank appeared to be startled that the officers were there. Officer Piro was standing 12 to 15 feet behind appellant. He saw appellant lean toward Frank, make a motion as if taking something out of his waistband and then make a "passing motion" with his outstretched hands toward Frank, as if handing something to him. Appellant and Frank turned away from the officers, and Piro saw that Frank was now holding a gun. Appellant and Frank ran down the alley. The officers chased them. Frank fell down. Appellant started to help Frank up. From a crouched position, Frank turned toward the officers and fired at them with the handgun. They fired back, numerous times. They wounded Frank, but were not hit themselves.

When the shooting stopped, Frank was lying on the ground with the .44-caliber magnum, "cowboy style" revolver near him. Appellant lay down next to Frank and put his arms out. The officers handcuffed appellant and Frank, radioed for assistance, and recovered the gun. Frank was taken to the hospital by ambulance and treated for his wounds. Appellant was arrested and driven to the Southwest police station. When he got out of the patrol car there, Detective Troy Laster patsearched him and found a .44-caliber shell casing in the breast pocket of the Pendleton shirt. The cylinder of the gun retrieved from Frank contained another .44-caliber casing. Both of the casings were fired by that gun.

Daniel Santoyo's body was lying at the fence in the alley, directly under K.H.'s apartment. He was 19 years old. There were headphones near his ear, attached to a music player in the backpack he was wearing. His bicycle lay nearby. He was unarmed.

He died from a gunshot that entered near his right earlobe and exited behind his left neck and shoulder. Stippling around the wound meant that the gun was held 18 to 24 inches from his face. The bullet trajectory was consistent with his facing the person with the gun, and then turning his head and ducking downward when the shot was fired.

Santoyo also had multiple abrasions on his face and head. Those injuries were consistent with two possibilities, either that he was punched in the face before he was shot, or that he was not punched but fell onto his face after he was shot. His hands did not show that he punched anyone or deflected any blows. He had no tattoos and tested negative for drugs and alcohol.

That same night, appellant was interviewed at the police station around 11:00 p.m. by Detective Laster and another detective. After waiving his rights, he made a partly exculpatory and partly incriminatory statement that omitted the shooting of either Solano or Santoyo. He said that he and Frank drank beer and then visited a friend who gave them the gun. They took the bus back to the area where they lived and visited appellant's girlfriend. When they were in the alley near her residence, they were approached by a male Hispanic on a bicycle. That person had to be Santoyo, so we use his name. According to appellant's statement, Santoyo asked appellant for his gang affiliation and then struck appellant twice in the face, causing him to fall to the ground. Santoyo then kicked appellant in the upper body and back of the head. Frank rescued appellant by pushing Santoyo against the fence. Appellant saw that Santoyo had a weapon that looked like Detective Laster's semiautomatic nine-millimeter handgun. Santoyo then made a "loud screeching noise," used by gang members to summon help. Three male Blacks arrived in the alley. One of them yelled that the police were coming. Appellant, Frank, Santoyo, and the three male Blacks ran through the alley, away from the police. Frank pulled out a gun and exchanged gunfire with the officers. When appellant and Frank were both lying on the ground, appellant saw the bullet casing and put it in his pocket.

During the interview, appellant said he was not aware of anyone other than Frank being shot that night. Detective Laster noticed that appellant had no marks or injuries on his face, head or neck, to support his story that he had been beaten up. He was released

and driven home the following morning, as the police investigation focused on Frank at that point. He was re-arrested several days later after the eyewitnesses were interviewed. When he was re-arrested, his mother gave the police the Pendleton shirt, which was hanging in a closet.

4. Additional Defense Testimony

Neither appellant nor Frank testified.

M.M. turned 14 years old around the time Santoyo was shot. She lived at that time in the same apartment building as K.H., L.L., and Santoyo. She testified that she had been appellant's girlfriend for some time and had not broken up with him before Santoyo was shot. On the evening of the shooting, appellant and Frank came to her apartment around 9:00 or 9:45 p.m.[1] Frank "was really drunk," but appellant was sober. Appellant and Frank came into the apartment, where Frank drank coffee that M.M.'s mother provided. They stayed at the apartment briefly and then left. Neither one had a gun. About five minutes later, M.M. heard multiple gunshots and saw the police.

During direct examination, M.M. denied that she was friends with Santoyo and said he was just a neighbor with whom she talked. On cross-examination, she denied or did not remember what she told Detective Whelan two days after Santoyo was shot. She told Whelan that she broke up with appellant in December 2003, Santoyo was "her best friend," and appellant had asked her whether Santoyo was "trying to hook up with" or "get with" her.

During cross-examination, M.M. also denied speaking with Santoyo's aunt after Santoyo was killed, or ever saying that she broke up with appellant partly because her mother did not approve of him. Then, she said she did not remember whether she and appellant broke up before Santoyo was killed. She had written love letters to appellant following his incarceration and implied in one of those letters that her mother would not

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[1] It appears that this visit occurred before A.B. and C.S. encountered appellant and Frank in the alley, which led to the shouting in the courtyard that preceded Santoyo's shooting.

let her open the door for him. On the witness stand, however, she denied that she had already broken up with appellant when he came to the door on the night of the shooting and said it was not true that her mother would not let him enter.

M.M.'s mother testified that she approved of M.M.'s relationship with appellant and, as far as she knew, the couple were still dating on the night Santoyo died. Frank and appellant were briefly inside her apartment that night, and she gave Frank coffee to drink, as he was drunk.

Appellant's mother testified that she did not wash appellant's Pendleton shirt, knew M.M. was appellant's girlfriend, and never heard they broke up before Santoyo was killed.

There was no gunshot residue on the Pendleton or on Frank's shirt, although such residue might not be found on clothing.

5. Prosecution Rebuttal Testimony

When Santoyo's aunt spoke with M.M. on the day after the shooting, M.M. said that appellant had seen her talking to Santoyo, appellant asked her if Santoyo was trying to start a relationship with her, and she told appellant that she and Santoyo "were just friends." The aunt asked M.M. why, at her age, she had a boyfriend like appellant. M.M. responded, "That's why we're not together anymore." M.M. also said that appellant and Frank were making a scene outside her door, and her mother would not let her open it.

Detective Whelan testified that M.M. told him soon after Santoyo was shot that Santoyo "was her best friend," and her mother made her stop dating appellant in December 2003.

DISCUSSION

1. Should the Trial Court Have Instructed on Voluntary Manslaughter and Imperfect Defense of Others?

When the court discussed the instructions with counsel, neither side had objections or additions to the proposed instructions. The jury was instructed on first degree murder through premeditation and deliberation, and on second degree murder. It was not instructed on the lesser included offense of voluntary manslaughter, arising from an

honest but unreasonable belief in the need to defend another from imminent danger of death or great bodily injury. (See *People v. Randle* (2005) 35 Cal.4th 987, 997; *People v. Flannel* (1979) 25 Cal.3d 668, 674-680.) Appellant contends that the lack of such instructions deprived him of his United States Constitution Sixth and Fourteenth Amendment rights to due process of law and a fair jury trial. He maintains that there was substantial evidence for the instructions because he told the police that the person on the bicycle attacked him in the alley. Recognizing that there was no request for those instructions, he argues, alternatively, that trial counsel's failure to request them violated his Sixth Amendment right to the effective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668.

We reject appellant's argument on the ground that his incomplete and self-serving statement to the police did not constitute substantial evidence to support instructing the jury on voluntary manslaughter and imperfect self-defense.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. [¶] . . . 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Appellant told Detective Laster that when he was with Frank in the alley, a male Hispanic, who we infer was Santoyo, approached on a bicycle, uttered gang challenges, punched him in the face, and kicked him when he was in the ground. He noticed that Santoyo had a gun like Detective Laster's gun. Frank pushed Santoyo against the fence, which caused Santoyo to screech for his fellow gang members. Three male Blacks appeared in the alley. All six people in the alley ran when the police arrived. Frank shot at the police and the officers fired back, wounding Frank.

Significantly, appellant said Frank pushed Santoyo against the fence, but he never said that either he or Frank did anything that would cause Santoyo to be injured. Moreover, the statement contained so many inconsistencies with the other evidence that

the prosecutor utilized the statement during final argument to show consciousness of guilt. Among those inconsistencies were: Appellant had no injuries that corroborated his story that Santoyo punched and kicked him. Santoyo did not have a gun when his body was found and had no injuries on his hands to show that he punched anyone. No one else heard the piercing screech. The police saw only appellant and Frank running in the alley and not the three phantom male Blacks, and certainly not Santoyo, whose body was already lying in the alley at that time.

Appellant maintains that the lack of corroboration of his statement does not matter, because "[t]he determination whether sufficient evidence supports the instruction must be made without reference to the credibility of that evidence." (*People v. Marshall* (1996) 13 Cal.4th 799, 847.) Here, however, appellant did not mention that he or Frank shot Santoyo in self-defense or to defend another. Appellant said no shooting occurred until Frank exchanged gunfire with the police officers. As appellant did not mention how Santoyo was killed, there was nothing in his statement that could reduce the killing from murder to manslaughter.

We therefore conclude that appellant's statement did not constitute substantial evidence from which the jury could reasonably have found that, instead of murder, appellant was guilty of voluntary manslaughter through an honest but unreasonable belief in the need to defend another. That conclusion means that the trial court did not err when it failed to instruct on that defense or on voluntary manslaughter.

We further find that defense counsel did not render ineffective assistance by failing to request instructions that lacked evidentiary support. Indeed, defense counsel did an excellent job of representing appellant, by suggesting that Frank was "basically a serial murderer" who walked up to people twice that day and shot them. The effectiveness of counsel's representation is shown by the fact that, even though K.H. believed she saw appellant pointing the gun at Santoyo, the jury found the personal gun use allegation not true, thereby removing 25 years from appellant's potential sentence.

2. The Instructions on Aiding and Abetting

The prosecutor argued that K.H.'s observation of the crime established that appellant was the actual shooter. He also argued that, if the jurors had any doubt on that point, appellant was also guilty as an aider and abettor, if Frank was the shooter and appellant was the person who held Santoyo against the fence. The jurors received Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM Nos. 400 and 401, the standard instructions on aiding and abetting.[2] Appellant maintains that CALCRIM No. 400 violated his federal constitutional rights to due process and trial by jury, because it states that the perpetrator and the aider and abettor are "equally guilty of the crime," when the correct rule is that an aider and abettor may have different criminal liability than the perpetrator, "based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

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[2] The jury received a version of CALCRIM No. 400 that stated: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. Two, he may have aided and abetted someone else, who committed the crime. In these instructions, I will call that other person the 'perpetrator.' A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. In order to find the defendant guilty of the crime charged you are not required to unanimously agree as to whether the defendant acted as a perpetrator or as an aider and abettor, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant either directly committed the crime charged or aided and abetted the perpetrator of that crime."

CALCRIM No. 401 then fully instructed the jury on what the People had to prove for appellant to be guilty as an aider and abettor, including these elements:

"1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

We reject appellant's contention on the ground that CALCRIM No. 400 correctly states the applicable law. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118; *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; see Pen. Code, § 31 ["All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

RUBIN, ACTING P. J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.